

INTERNAL USE ONLY

OLC 77-0271

1 FEB 1977

MEMORANDUM FOR: [REDACTED]
General Counsel

STATINTL

FROM : George L. Cary
Legislative Counsel

SUBJECT : Sources and Methods Legislation

1. As you are aware, it has been decided to hold off, until a new DCI is on board, submitting a formal letter to our oversight committees outlining our position on sources and methods legislation and the need for prompt congressional action. In the interim, however, there is work that we can do in terms of strengthening and unifying our own position, and in terms of laying the necessary groundwork with selected members and staffers on the committees. This week we are anticipating a call from Select Committee staffers for a meeting at Headquarters to review the definitional problem of sources and methods.

2. Perhaps most important, we should develop a very clear understanding of what exactly we want and need in legislation. A first step is examining H.R. 12006, the sources and methods bill from the 94th Congress. I think we all agree that no one piece of legislation, realistically, can be a panacea for all the problems surrounding protection of intelligence information and the unauthorized disclosure thereof; this applies to H.R. 12006. This bill, however, affords a good starting point from which to develop legislation that is most likely to meet our needs (and which most comprehensively addresses constitutional or other concerns that might be raised in opposition).

3. Specifically, I think the following issues, and any others which you may identify, should be examined in light of improving H.R. 12006:

a. What extraterritorial effect would a statute such as H.R. 12006 have (would it, for example, be available in an "Agee-type" case)?

b. Section 6 of the bill, providing for in camera hearings to determine--as questions of law--whether the information disclosed was properly classified or designated as sources and methods information, may be construed as violative of the VI Amendment to the Constitution (specifically, the right to be informed of charges, to confront witnesses, and to trial by jury). Does this present a serious problem?

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OS 70424

c. Are there defenses, other than those which might derive from the terms of this bill (Section 4, "bars to prosecution"), which could be raised so as to reveal intelligence information outside the in camera proceedings noted supra? For example, would the discovery provisions of the Federal Rules of Criminal Procedure, particularly Rule 16(b), present problems if the language of H.R. 12006 remained intact? Should we consider adding other "bars to prosecution" in Section 4?

d. Is the definition of intelligence "methods" in H.R. 12006 (see also the definitions in Section 1128 of S. 1) sufficiently broad?

e. H.R. 12006 provides no motivation defense; to provide any such defense would, of course, seriously weaken the legislation. Are there any foreseeable problems in this regard given the language of H.R. 12006?

4. The bottom line, of course, is to develop a bill that will enable the Government to prosecute cases involving unauthorized disclosure of sensitive intelligence information without disclosing additional or confirming such information. Preliminary soundings with key members of our oversight committees indicate that prospects for sources and methods legislation during this session are good; recent disclosure incidents certainly support our arguments. We should continue the dialogue on this matter with our committees and, to insure we will be presenting our best case, our two staffs should be in contact to address whatever problems there are in H.R. 12006 and to make sure our interests are properly reflected in whatever product emerges from our discussions with the Congress, Justice and the White House.

SIGNED

George L. Cary

Distribution:

Original - Addressee

1 - DDA

✓ 1 - OS

1 - [REDACTED]

1 - OLC Chrono

1 - OLC Subject

STATINTL

OLC:RLB:hms (31 January 1977)

2

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94TH CONGRESS
2D SESSION

H. R. 12006

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1976

Mr. McCLORY (for himself, Mr. TREEN, Mr. KASTEN, Mr. MICHEL, Mr. ANDERSON of Illinois, and Mr. BROOMFIELD) introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend the National Security Act of 1947, as amended, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 102 of the National Security Act of 1947, as
4 amended, (50 U.S.C.A. 403) is further amended by adding
5 the following new subsection (g) :

6 “(g) In the interests of the security of the foreign
7 intelligence activities of the United States, and in order
8 further to implement the proviso of section 102 (d) (3) of
9 the Act that the Director of Central Intelligence shall be
10 responsible for protecting intelligence sources and methods
11 from unauthorized disclosure—

I

1 “(1) Whoever, being or having been in duly au-
2 thorized possession or control of information relating to
3 intelligence sources and methods, or whoever, being or
4 having been an officer or employee of the United States,
5 or member of the armed services of the United States,
6 or a contractor of the United States Government, or an
7 employee of a contractor of the United States Govern-
8 ment, and in the course of such relationship becomes
9 possessed of such information imparts or communicates
10 it by any means to a person not authorized to receive it
11 or to the general public shall be fined not more than
12 \$5,000 or imprisoned not more than five years, or
13 both;

14 “(2) For the purposes of this subsection, the term
15 ‘information relating to intelligence sources and meth-
16 ods’ means any information, regardless of its origin,
17 that is classified pursuant to the provisions of a statute
18 or Executive order, or a regulation or a rule issued
19 pursuant thereto as information requiring a specific
20 degree of protection against unauthorized disclosure for
21 reasons of national security and which, in the interest of
22 the foreign intelligence activities of the United States,
23 has been specifically designated by a department or
24 agency of the United States Government which is au-
25 thorized by law or by the President to engage in foreign

1 intelligence activities for the United States as informa-
2 tion concerning—

3 “(A) methods of collecting foreign intelligence;

4 “(B) sources of foreign intelligence, whether
5 human, technical, or other; or

6 “(C) methods and techniques of analysis and
7 evaluation of foreign intelligence.

8 “(3) A person who is not authorized to receive
9 information relating to intelligence sources and methods
10 is not subject to prosecution for conspiracy to commit an
11 offense under this subsection, or as an accomplice, within
12 the meaning of sections 2 and 3 of title 18, United States
13 Code, in the commission of an offense under this sub-
14 section, unless he became possessed of such information in
15 the course of a relationship with the United States Gov-
16 ernment as described in paragraph (1): *Provided, how-*
17 *ever,* That the bar created by this paragraph does not
18 preclude the indictment or conviction for conspiracy of
19 any person who is subject to prosecution under para-
20 graph (1) of this subsection.

21 “(4) It is a bar to prosecution under this subsec-
22 tion that—

23 “(A) at the time of the offense there did not
24 exist a review procedure within the Government
25 agency described in paragraph (2) of this subsection.

1 through which the defendant could obtain review of
2 the continuing necessity for the classification and
3 designation;

4 “(B) prior to the return of the indictment or
5 the filing of the information, the Attorney General
6 and the Director of Central Intelligence did not
7 jointly certify to the court that the information was
8 lawfully classified and lawfully designated pursuant
9 to paragraph (2) at the time of the offense;

10 “(C) the information has been placed in the
11 public domain by the United States Government; or

12 “(D) the information was not lawfully classi-
13 fied and lawfully designated pursuant to paragraph
14 (2) at the time of the offense.

15 “(5) It is a defense to a prosecution under this
16 subsection that the information was communicated only
17 to a regularly constituted subcommittee, committee or
18 joint committee of Congress, pursuant to lawful demand.

19 “(6) Any hearing by the court for the purpose of
20 making a determination whether the information was
21 lawfully classified and lawfully designated, shall be in
22 camera;

23 “(A) at the close of any in camera review, the
24 court shall enter into the record an order pursuant
25 to its findings and determinations;

1 “(B) any determination by the court under this
2 paragraph shall be a question of law.

3 “(7) Whenever in the judgment of the Director of
4 Central Intelligence any person is about to engage in
5 any acts or practices which will constitute a violation of
6 this subsection, the Attorney General, on behalf of the
7 United States, may make application to the appropriate
8 court for an order enjoining such acts or practices, and
9 upon a showing that such person is about to engage in
10 any such acts or practices, a permanent or temporary
11 injunction, restraining order, or other order may be
12 granted. In the case of an application for an order under
13 this paragraph—

14 “(A) the court shall not hold an in camera
15 hearing for the purpose of making a determination
16 as to the lawfulness of the classification and designa-
17 tion of the information unless it has determined after
18 giving due consideration to all attending evidence
19 that such evidence does not indicate that the matter
20 has been lawfully classified and designated;

21 “(B) the court shall not invalidate the classifi-
22 cation or designation unless it finds that the judg-
23 ment of the department or agency, pursuant to para-
24 graph (2), as to the lawfulness of the classification
25 and designation was arbitrary, capricious, and with-
26 out a reasonable basis.

94TH CONGRESS
2D SESSION

H. R. 12006

A BILL

To amend the National Security Act of 1947, as amended, and for other purposes.

By Mr. McCLOY, Mr. TREN, Mr. KASTEN, Mr.
MICHEL, Mr. ANDERSON of Illinois, and Mr.
BROOKFIELD

FEBRUARY 19, 1976

Referred to the Committee on Armed Services

UNCLASSIFIED CONFIDENTIAL SECRET

OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	AC/PPG		
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<input type="checkbox"/> ACTION	<input type="checkbox"/> DIRECT REPLY	<input type="checkbox"/> PREPARE REPLY
<input type="checkbox"/> APPROVAL	<input type="checkbox"/> DISPATCH	<input type="checkbox"/> RECOMMENDATION
<input type="checkbox"/> COMMENT	<input type="checkbox"/> FILE	<input type="checkbox"/> RETURN
<input type="checkbox"/> CONCURRENCE	<input type="checkbox"/> INFORMATION	<input type="checkbox"/> SIGNATURE

Remarks:

The attached "shelf item" was staffed in OS on a respond when you can basis. PSI offered pertinent comments. SSC raised a question. PTOS & ISSG did not respond and three components had no comment. PTOS contacted me informally and questioned the validity of commenting on fine points of law which probably will be argued by attorneys and possibly referred for court decision.

I think we have all that can be expected in this type of exercise and recommend the action be forwarded to the Registry for appropriate "shelving."

Concur

FOLD HERE TO RETURN TO SENDER	
FROM: NAME, ADDRESS AND PHONE NO.	DATE
STATINTL	7/12/77

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Sources and Methods Legislation

FROM: [REDACTED] STATINTL PPG, 4E70	EXTENSION 5311	NO. DATE 7 Feb 1977
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TO: (Officer designation, room number, and building)	DATE		OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
	RECEIVED	FORWARDED		

1. DD/PSI *Comment (SA)*

2. DD/PTOS *no return as of 5/27/77 & 7/12/77*

3. C/SSC *Return (SA)*

4. C/ISSG *no return as of 5/27/77 & 7/12/77*

5. C/SRD *No Comment 15 Feb*

6. C/IRG *No Comment 14 Mar.*

7. C/A&TD *No Input 8 Feb*

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15.

As evidenced in the attached, Sources and Methods legislation probably will be of interest to this session of the 94th Congress. In anticipation that OS will be consulted or otherwise figure in the development of an Agency position by OGC and/or OLC your assistance is requested in:

a. Comments or suggestions relating to the substance and wording of HR 12006; and

b. Input re the specifics mentioned in the OLC memo.

On a non-priority basis and without a deadline it is requested that you study the attachments and submit comments to PPG in a reasonable time. Questions or verbal responses may be directed to [REDACTED] x5311.

STATINTL

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Approved For Release 2001/09/03 : CIA-RDP83B00823R000100080003-6

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Sources and Methods Legislation

FROM	EXTENSION	NO.	DATE	TO: (Officer designation, room number, and building)	DATE		OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
					RECEIVED	FORWARDED		
PPG, 4E70	STATINTL	5311	7 Feb 1977					
1. DD/PSI								<p>As evidenced in the attached, Sources and Methods legislation probably will be of interest to this session of the 94th Congress. In anticipation that OS will be consulted or otherwise figure in the development of an Agency position by OGC and/or OLC your assistance is requested in:</p> <p>a. Comments or suggestions relating to the substance and wording of HR 12006; and</p> <p>b. Input re the specifics mentioned in the OLC memo.</p> <p>On a non-priority basis and without a deadline it is requested that you study the attachments and submit comments to PPG in a reasonable time. Questions or verbal responses may be directed to [redacted] x5311.</p> <p>2-6- Pls Return to me</p>
2. e/cy								
3. STATINTL								
4. review								
5. STATINTL								
6. [redacted]								
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USE ONLY☐ UNCLASSIFIED

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Sources and Methods Legislation

FROM: [redacted] STATINTL
PPG, 4E70

EXTENSION
5311

NO.

DATE
7 Feb 1977

TO: (Officer designation, room number, and building)

DATE
RECEIVED FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1.	C/SSG, 3F22			<i>[Signature]</i>	As evidenced in the attached, Sources and Methods legislation probably will be of interest to this session of the 95th Congress. In anticipation that OS will be consulted or otherwise figure in the development of an Agency position by OGC and/or OLC your assistance is requested in: a. Comments or suggestions relating to the substance and wording of HR 12006; and b. Input re the specifics mentioned in the OLC memo. On a non-priority basis and without a deadline it is requested that you study the attachments and submit comments to PPG in a reasonable time. Questions or verbal responses may be directed to [redacted] x5311.
2.	[redacted]			<i>[Signature]</i>	
3.	[redacted]				
4.	[redacted]				
5.	STATINTL				
6.					2 - Wally - pls read this, and let me know whether SCI is properly covered 4. Ted - pls advise that comment 3. Bob - I believe it is But I note that the key for protection of intel. is classification, not saying said about contents w/ special changes
7.					
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10.			STATINTL		
11.					
12.	Bob - Should there not				
13.	be some sort of cross reference to 18 USC 798 -				
14.	the COMSEC/COMINT law?				
15.	Janet W.				

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: Legislative Counsel
7D35 HQ

EXTENSION

6126

NO.

DATE

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. DD/Security
GE31 HQ

2. C/PPG

3 Feb 77

DB

3. [REDACTED]

4. STATINTL

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2-3: For use as a shelf draw, let us solicit OS component comment on

(a) Any suggested changes in HR12006
(b) The questions raised in [REDACTED] memo.

STATINTL

OS 70424

25 February 1977

MEMORANDUM FOR: DD/PSI

FROM : [REDACTED] STATINTL
Liaison Officer

THROUGH : Chief, Clearance Division

SUBJECT : Sources and Methods Legislation

1. Reference is made to OLC memorandum dated 1 February 1977 subject as captioned above.

2. I have reviewed H.R. 12006 and desire to make the following observations.

3. I believe that H.R. 12006 is a good bill but that it's principle weakness is in the definition of sources and methods. In this connection I propose that (A) line 3, page 3, be amended to read as follows:

"(A) methods of collecting foreign intelligence including support activities relating thereto such as cover mechanisms and security procedures which require protection."

4. In addition to the foregoing it is recommended that (6) line 19, page 4, be changed to include the following:

"Any hearing by the court for the purpose making a determination whether the information was initially lawfully classified and lawfully designated and for the purpose of making a determination whether the information was still properly classified at the time of the offense, shall be in camera."

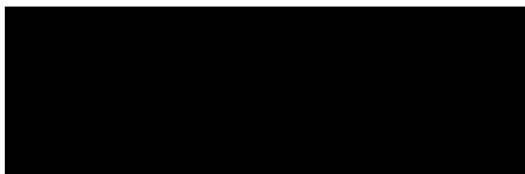
This recommended change is believed necessary inasmuch as the language of (4) (D) above establishes a bar to prosecution

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where the information was not lawfully classified or designated at the time of the offense. It is believed in this connection that all hearings before the court relating to the latter should be held in camera, to protect current classified or sensitive information that may be used to convince the court that the information in question is still in fact lawfully classified or designated.

5. As indicated in my notes on the OLC memorandum, I have reservations about the constitutionality of the provision for the in camera hearings, however, I feel that there is no other alternative to accomplish the stated objective of providing legislation that would enable the government to prosecute cases involving unauthorized disclosures of sensitive intelligence information without disclosing additional sensitive intelligence information or confirming same by going to trial under current law or criminal procedure.

STATINTL



ADMINISTRATIVE-INTERNAL USE ONLY

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Sources and Methods Legislation

FROM: [redacted] STATINTL Liaison Officer GH-02		EXTENSION 7646	NO. DATE 25 February 1977
TO: (Officer designation, room number, and building)	DATE		OFFICER'S INITIALS
	RECEIVED	FORWARDED	
1. AC/CD		2/28/77	STATINTL
2. C/OPS/PSI	1 MAR 1977	2/1	
3. DD/PSI			
4. PPG attention: [redacted]			
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